

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

**PLANO SYMPHONY ORCHESTRA
ASSOCIATION, Employer**

And

**DALLAS/FORT WORTH PROFESSIONAL
MUSICIANS ASSOCIATION, LOCAL 72-
147 OF THE AMERICAN FEDERATION
OF MUSICIANS, Petitioner**

§
§
§
§
§
§
§
§
§
§

Case No. 16 RC 10844

**PETITIONER'S BRIEF IN OPPOSITION
TO GRANT OF REVIEW**

Respectfully submitted,

Yona Rozen
State Bar No. 17358500
yrozen@grwlawfirm.com

GILLESPIE, ROZEN, WATSKY & JONES, P.C.
3402 Oak Grove Ave., Suite 200
Dallas, Texas 75204
Telephone.: (214) 720-2009
Telecopier: (214) 720-2291

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iii
I. INTRODUCTION AND FACTUAL BACKGROUND.....	1
II. SUMMARY OF FACTS.....	2
III. ARGUMENT	6
A. THE MUSICIANS ARE EMPLOYEES SINCE AN APPLICATION OF THE MULTI-FACTOR ANALYSIS TO THE CIRCUMSTANCES OF THIS CASE ESTABLISHES A RELATIONSHIP BETWEEN AN EMPLOYER AND AN EMPLOYEE RATHER THAN A BUSINESS ARRANGEMENT BETWEEN AN INDEPENDENT CONTRACT AND A CLIENT	6
1. The PSOA Has the Right of Control.....	7
2. The Musicians Are Engaged in a Distinct Occupation	10
3. The Musicians Do Not Bear Any Entrepreneurial Risk of Loss or Enjoy Any Entrepreneurial Opportunity for Gain.....	10
4. Both Parties Provide Instrumentalities of Work	12
5. The Musicians Are Highly Skilled Employees.....	12
6. The Parties Believe Differently Concerning Their Status as Employees Versus Independent Contractors	12
7. The Work, Playing Music, is Part of the PSOA’s Regular Business.....	13
8. The Employer is “In the Business” of Music.....	14
9. The Musicians Are Paid Both By the Job and By Time	14
10. The Length of Time that Musicians Are Employed Varies Considerably.....	14
IV. CONCLUSION.....	16
CERTIFICATE OF SERVICE	17

TABLE OF AUTHORITIES

CASES:

<i>American Federation of Musicians (Royal Palm Dinner Theater)</i> , 275 NLRB 677 (1985)	10
<i>BKN, Inc.</i> , 333 NLRB 143, 144 (2001)	6, 10, 11
<i>Cf. Pennsylvania Academy of the Fine Arts</i> , 343 NLRB, 846 (2004)	10, 13, 15
<i>Chamber Orchestra of Philadelphia</i> , 4-RC-21019	11, 15
<i>Community Bus Lines</i> , 341 NLRB 61 (2004)	13
<i>Concerto Soloist d/b/a, the Chamber Orchestra of Philadelphia</i> , Case 4-RC-21019 (2005)	7
<i>DIC Animation City, Inc.</i> , 295 NLRB 989 (1989)	11
<i>Houston Building Services, Inc.</i> , 296 NLRB 808 (1989)	13
<i>Lancaster Symphony Orchestra</i> , 4-RC-21311	7
<i>Miller Road Dairy</i> , 135 NLRB 217, 220 (1962)	12
<i>National Freight</i> , 153 NLRB 1536 (1965)	12
<i>NLRB v. United Insurance Co.</i> , 390 U.S. 254, 258 [67 LRRM 2649]	6
<i>Roadway Package System</i> , 326 NLRB 72 (1998)	6

OTHER AUTHORITIES:

<i>Igramo Enterprise, Inc. and Orces Fries and Gustavo Betancourt</i> , 2006 WL 2688796 (NLRB Division of Judges September 15, 2006 No. 20-CA-27247)	13
--	----

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

**PLANO SYMPHONY ORCHESTRA
ASSOCIATION, Employer**

And

**DALLAS/FORT WORTH PROFESSIONAL
MUSICIANS ASSOCIATION, LOCAL 72-
147 OF THE AMERICAN FEDERATION
OF MUSICIANS, Petitioner**

§
§
§
§
§
§
§
§
§
§

Case No. 16 RC 10844

**PETITIONER'S BRIEF IN OPPOSITION
TO GRANT OF REVIEW**

TO THE HONORABLE BOARD MEMBERS:

COMES NOW, Dallas/Fort Worth Professional Musicians Association, Local 72-147 of the American Federation of Musicians, (hereinafter referred to as "DFW Musicians" and/or the "Petitioner"), and files this Brief in response to the granting the Employer's Request for Review with respect to the status of the musicians, and in support thereof, would show as follows:

**I.
INTRODUCTION AND FACTUAL BACKGROUND**

Petitioner filed a petition seeking to represent all musicians employed by the employer and excluding all other employees including, guards, clerical employees, and supervisors as defined in the Act.

A hearing was conducted on May 14 and 15, 2008 in Fort Worth, Texas. One of the issues raised at the hearing was the Employer's contention that all of the musicians utilized by the

Employer are independent contractors, as opposed to employees. Since the Employer has asserted this issue, the Employer bears the burden of proof with respect to this issue. The Regional Director of Region 16 issued a Decision and Direction of Election finding, inter alia, that the musicians are employers rather than independent contractors. The PSOA filed a Request for Review raising a number of issues but the Request was granted only on the issue of employee status. This brief is filed in accordance with Section 102.67(K)(3) of the Rules and Regulations. The Union urges the Board to uphold the Regional Director's decision and find the musicians to be employees, entitled to coverage under the NLRA.

II.

SUMMARY OF FACTS

The record reflects that the Employer regularly schedules a series of concerts, including six classical concerts, as well as a number of other optional music programs, including a family program, a July 4th concert, and a Christmas concert.¹ (TR 222) The record reflects that there is a core group of musicians (who number approximately 35) who are offered annual contracts. (TR 146) Under these annual contracts, the core musician must agree to play at least five of the six regularly scheduled classical concerts but may, if they follow the appropriate provisions set for in the contract, opt out of one of these blocks of required services. (TR 60, 222, 225). In addition, the PSOA also offers them the option of participating in the additional concert blocks, over and above the required five out of six classical concerts. The record clearly reflects that there is a core group of musicians who have a reasonable expectation to return, season after season, as core members of the orchestra. (TR 146). In addition, there are other musicians who are regularly offered on an individual concert basis the opportunity to play in specific concerts. (TR 165). Again, it appears that there is a regular group of musicians who regularly play at least some

¹ References to the Transcript are denoted by TR followed by page number(s).

services every season for the Employer. (It appears there are approximately 20-25 regular non-core). Finally, while the number of musicians varies depending on the music to be played, generally there are 60-65 musicians seated as "the orchestra". (TR 74).

Finally, it is clear from the testimony of the personnel manager who, under the direction of the conductor, makes arrangements for the hiring of the various musicians, that he utilizes a series of ranked musicians to use to fill in for absences and/or additional needs based upon the music. Ultimately, these rankings are set by the musical director, with input from the principals of each section. (TR 150, 232, 259).

Although the record reflects that many of the musicians provide their own instruments, the record also reflects that the symphony rents some instruments for musicians (particular percussion) and further, that the musical director controls and directs the musicians if he is dissatisfied with their selection of a particular instrument. (TR 268, 277). Further, the record also reflects that the Employer provides the music which is to be played by each musician, requires certain dress, and requires particular attendance, as well as preparation, for rehearsals and concerts. Many of these provisions are set forth in the contracts. (See Employer Exhibits 2 and 4). In addition, it is clear from the testimony of both the Petitioner's witnesses, as well as the witnesses produced by the Employer that, while the musicians are all professional musicians capable of playing their own instruments, they are given specific direction and instruction by the music director as to how he wants them to play, i.e. either louder, softer, sooner, later, etc. to achieve the musical interpretation of particular pieces that he is seeking. (TR 38, 69, 78, 104, 226, 229, 254-256, 273, 277).

The musicians who are hired by the Employer help and contribute to the Employer's main product (the main product and reason for being in business is the "production of musical

concerts"). (TR 229). Moreover, the record clearly indicates, both in terms of the language in the contracts which are signed, and by virtue of the testimony of a number of the witnesses, that the personnel manager (concert production manager, Jim Gasewicz) and the music conductor exercise substantial control over the musicians who are hired to play for these concerts.

The musicians who comprise the core group of musicians are provided with a package prior to the beginning of a season. The package purports to be a contract indicating that the signator is an independent contractor and not an employee of the PSOA. Principal musicians are paid \$122.00 per service, and section players are paid \$98.00 per service.² A service includes either a rehearsal or a concert. The contracts also provide for additional payments if services extend beyond specific times in 15 minute increments. Tardiness will cause a \$1.00 per minute fine or deduction. (TR 230). Certain musicians who have instruments that are difficult to transport may also be paid a cartage fee, although that is not listed in the contract. (TR 249). There are provisions in the contract for additional services. Contracts are sent out to all of the employees who have been determined to be core players. Generally, this has been based upon an audition initially before the music director and a committee of principals. However, the record reflects that ultimately it is the music director who has the final say.³ The musician is to return the

²Raised to \$130.00 and \$109.00 in 2008.

³In addition, it should be noted the fact that the musical director has final say in a number of matters is clearly reflected in the language included in the Individual Musician Personal Services Agreement (Employer Exhibit 4) and the Individual Musician Personal Services Agreement for a Single Concert Block (as reflected in Employer Exhibit 2). In both instances, the musicians are required to arrive for every service at least 15 minutes before the scheduled start and to be seated at least 5 minutes before the scheduled start. For concerts and performances, there are requirements with respect to their attire. They must be responsible to prepare the music in advance of the first rehearsal. They will be docked for tardiness to rehearsal or performances or returning late after an intermission. In addition, there is a specific management rights provision (it is interesting to note that this language is similar to what had previously been included in an earlier collective bargaining agreement based upon a voluntary recognition in the late '90s, Petitioner Exhibit 17). The management rights provisions specifically provides at B, The Artistic Director shall have full artistic control of all performances and rehearsals and shall regulate all phases of the musician's musical effort, seating order, professional conduct, and appearance.

agreement by a certain date and is required to play at least five of the six required concerts with a specific provision for opting out of one. The contracts specifically provide a lot of direction and details with respect to what is required of the employees in terms of when they need to appear for rehearsal and how they need to dress for the concerts. Once the rehearsal commences, the conductor controls the rehearsal, the musicians have previously been provided with music, and are expected to commence rehearsal at the first rehearsal. Dress is regulated by a dress code. The symphony arranges for, and leases space for rehearsals and performance. The conductor/music director gives direction as to how each piece of music should be played. He tells the musicians how he would like the music to sound and on occasion, instructs them on how to play their instruments to achieve that sound. The musicians are highly skilled and for the most part work for other employers, both as musicians and otherwise.

Pursuant to the independent contractor agreement, no taxes are withheld from the musicians' payment. No W-2 is issued and instead, 1099s are issued for each musician. The symphony can discipline musicians and terminate them, and has done so. (TR 283). To that extent, it has issued and enforces rehearsal and performance guidelines which reflect standards for the musicians to follow both during the performance and rehearsals.

The PSOA generates its revenues from both ticket sales and donations. Musicians' payments are on a per service basis (with an additional hourly rate for time in excess of normal services) and do not vary depending on the number of tickets sold or any other factors. (TR 283-284).

All of these terms and conditions are unilaterally established by the Employer without negotiations with any individual musician. The Employer sets the dates, hours, and times of the programs, including both the rehearsals and performances. The Employer sets the compensation

rate for the performances. The Employer determines the length of breaks. In addition to musicians who are subject to this petition, the Employer does separately contract for guest appearances by national musicians who are then featured as soloists.

III. ARGUMENT

A. THE MUSICIANS ARE EMPLOYEES SINCE AN APPLICATION OF THE MULTI-FACTOR ANALYSIS TO THE CIRCUMSTANCES OF THIS CASE ESTABLISHES A RELATIONSHIP BETWEEN AN EMPLOYER AND AN EMPLOYEE RATHER THAN A BUSINESS ARRANGEMENT BETWEEN AN INDEPENDENT CONTRACTOR AND A CLIENT.

The party seeking to exclude employees as independent contractors has the burden of proving that status. *BKN, Inc.*, 333 NLRB 143, 144 (2001). Therefore, in this case the burden is on the PSOA to show that the musicians are independent contractors. The Board applies the common-law agency test to determine whether individuals are statutory employees or independent contractors. This determination “ultimately depends upon an assessment of all of the incidents of the relationship with no one factor being decisive.” See *NLRB v. United Insurance Co.*, 390 U.S. 254, 258 [67 LRRM 2649], enforcing 154 NLRB 38 (1965).

The relevant factors include (1) whether the employer retains the right to control the manner and means by which the result is to be accomplished; (2) whether the individual is engaged in a distinct occupation or business; (3) whether the individual bears entrepreneurial risk of loss and enjoys entrepreneurial opportunity for gain; (4) whether the employer or the individual supplies instrumentalities, tools, and place of work; (5) the skill required in the particular occupation; (6) whether the parties believe they are creating an employment relationship; (7) whether the work is part of the employer’s regular business; (8) whether the employer is “in the business”; (9) the method of payment, whether by time or by the job; and (10) the length of time the individual is employed. See, e.g., *BKN, Inc.*, 333 NLRB at 144; *Roadway Package System*,

326 NLRB 72 (1998).

In sum, the Board balances all the incidents of the employment relationship in order to determine whether the circumstances demonstrate an employment relationship between employer and employee or a business arrangement between independent contractor and client.

Recently, the Regional Director for Region 4 issued a Decision and Direction of Election in *Concerto Soloist d/b/a, the Chamber Orchestra of Philadelphia*, Case 4-RC-21019 (2005) wherein she found employee rather than independent contractor status in almost identical facts.⁴ In that case, each of the factors was reviewed. It is instructive, therefore, to apply each relevant factor to the facts in this case to determine whether the balance tips in favor of the Petitioner for employee status or the Employer for independent contractor status.

1. The PSOA Has the Right of Control

The PSOA controls the manner and means by which the result is accomplished. The PSOA determines the dates and hours for both rehearsals and concerts. It determines when breaks are taken and the amount of break time during the rehearsals. It requires attendance at all rehearsals and only allows musicians to be excused from a rehearsal with the approval of the conductor. It requires that if any musician wants to cancel part or all of a series, they must notify the PSOA within a specific time frame. It requires core members to play a minimum of five out of six of the regular series concerts.

The PSOA has a specific dress code and performance guidelines. The PSOA retains the right to discipline and has disciplined employees for breaches of the requirements. The

⁴It appears that a request for review was filed but not granted by the Board. In contrast, in the *Lancaster Symphony Orchestra*, 4-RC-21311, upon which PSOA relies, while the Regional Director found the musicians to be independent contractors, the Board did grant a Request for Review filed by the Union and that case is currently pending before the Board.

conductor, as management, gives overall direction as to how each piece should be played and instructs the musicians how he would like the music to sound. He has even gone so far as to instruct them on how to play their instruments to achieve that sound. During the rehearsals he is in complete control. While the musicians are expected to be ready to play at the commencement of rehearsal and to exercise their judgment on how to play the particular piece, the final decision as to how the piece should be played is with the conductor and not the musicians.

The independent contractor agreement and the documents that accompany it also establish control. The PSOA establishes how many series will be played and what series will be played. The PSOA decides how much pay each musician will receive. The PSOA also decides if there are any increases in such payments from year to year. The PSOA uses a standard contract with standard fees for all musicians regardless of the skill experience or ability of any musician. The musicians must either accept or reject the contract as is, there is no opportunity to bargain concerning wages, hours, or conditions of employment. Instead, those conditions are all determined unilaterally by the PSOA without any input from the musicians. It is a take it or leave it proposition.

Given the restrictions in the contracts and the requirements that core musicians perform five of the six regularly scheduled blocks, the musicians are not completely free to choose their own hours. They must select from preset performances and once they have made their choice, they are required to be present during specific periods of time. In particular, the PSOA determines the dates and hours for both rehearsals and concerts. It requires attendance at all the rehearsals and excuses attendance from a rehearsal only with the approval of the conductor.

In this respect, musicians are no different than construction workers working out of a union hall through a hiring hall system. Construction workers (or for that matter or stage hands) decide

whether, when and how much to work for a particular employer under that system. If they are on a referral system for work and a business representative offers them work, they decide whether they are going to work and thereby when they are going to work and how much they are going to work for that particular employer. However, the employer sets and determines where the job site is, how many hours of employment are necessary, and whether to accept that particular employee for work. There is no difference whatsoever between a construction worker or stage hand working under a hiring hall system and PSOA musicians in terms of control over schedules. The PSOA is just like a construction company or a producer of music or a show in that it determines what job is being performed, where it is being performed, and how many hours for which it will hire a musician. No one seriously argues that construction workers or stage hands are independent contractors under a hiring hall system. There is no distinction between these musicians and construction workers and there should be no difference in categorization of construction workers as employees as opposed to these musicians. They are employees not independent contractors.

A true independent contractor accepts a job and will usually negotiate with the owner that he will have the work performed by a date certain or over a defined period of time. It would be up to the contractor which days or hours he actually performs the work, subject to any restrictions the owner may have in order to operate the business. However, the ultimate decision as to when the work is performed in terms of which hours, on which days, once the parties negotiate what work is to be performed, rests with the contractor and not the owner. On the other hand, when work is performed is a decision made by the employer when there is employee status. Clearly, the PSOA decides when the work is performed. It decides when the rehearsals are down to the minute, and does the same with the performances. The musicians are employees and not independent

contracts since the PSOA, and not the musicians, decide when the work is to be performed. The only decision the musicians make is whether they wish to perform the work on the dates and times that the Symphony decides it will be done. That is an employer/employee relationship.

2. *The Musicians Are Engaged in a Distinct Occupation*

The musicians can play not only for the PSOA, but for other entities as well. Many of these musicians do so. However, the fact that the musicians work outside of their relationship with the PSOA does not establish independent contractor status on the basis that they are engaged in a distinct business. It simply indicates that the musicians work part time for the PSOA, as they do for other employers. While it is arguable that while the musicians do have a distinct occupation as musicians, it is the relationship between the individual and the employer in question which must be examined in order to determine whether that relationship is one of employer to employee or independent contractor to client. See *BKN, Inc.*, 333 NLRB 143, 144 (2001); *American Federation of Musicians (Royal Palm Dinner Theater)*, 275 NLRB 677 (1985); *Cf. Pennsylvania Academy of the Fine Arts*, 343 NLRB, 846 (2004). The Union would caution against having this standard applied to find against employee status since allowing the mere fact that the musicians work for other employers as well, to support independent contractor status, could arguably be applied to any employee who works part-time or seasonally to cobble together a living by working for several different employers.

3. *The Musicians Do Not Bear Any Entrepreneurial Risk of Loss or Enjoy Any Entrepreneurial Opportunity for Gain*

Entrepreneurial risk and opportunity exists when an individual's profit is dependent on his ability to recoup in the contract fee the investment he has incurred, in terms of time or money expended, in obtaining and fulfilling the contract. See, e.g., *BKN, Inc.*, 333 NLRB at 145. The

musicians risk nothing by contracting with the PSOA. They do not incur any significant financial investment in meeting their responsibilities under their contract with the PSOA, nor do they have any entrepreneurial opportunity for gain. They do not increase their income from the PSOA based on a good performance. The Symphony pays a standard fee regardless of experience, ability, or past performance. The musicians do not get more money because they play better or get less money because they played worse. They do not benefit by increased ticket sales, nor are they impaired by a lack of sales. They still will get the same contracted for fee. They do not have any gain or any risk of loss depending on ticket sales. Their only way in increasing their income is to perform more work, which is not indicative of independent contractor status. See *BKN, Inc.*, 333 NLRB at 145, compare with *DIC Animation City, Inc.*, 295 NLRB 989 (1989). The Regional Director in Region Four distinguished *DIC Animation* in the *Chamber Orchestra of Philadelphia* decision noted above, by noting that the animation writers in that case bore risks and enjoyed opportunities for gain associated with entrepreneurial enterprise, since they spent significant time and effort soliciting work and faced the possibility that their ideas could be rejected and they would not get paid. Some of the writers in *DIC* had formed their own companies with which the employer contracted for the writers' services and other formed teams and decided which part of the script each member would write and how much each member would be paid. Finally, the writers in *DIC* negotiated the number of scripts on which they would work as well as residuals, royalties, and any guaranteed work on future projects. None of these types of activities occurs in the instant case.

Nor do the musicians act as independent contractors, they do not hold themselves out as individual performers. The Symphony does not present them as individual performers. The Symphony brochures which are distributed to the public do not identify the musicians as

individual performers. That is reserved for guest soloists who are independent contractors. The reason for these activities and the lack thereof, is that the musicians do not act as individual entrepreneurs, but act as a group under the direction and control of the PSOA. They are employees, there is no entrepreneurial risk or gain for the musicians and this factor falls clearly on the side employee status determination.

4. *Both Parties Provide Instrumentalities or Work*

Many of the musicians supply their own musical instruments and they supply their dress, but everything else is supplied by the PSOA. The PSOA provides the location for rehearsal and performances through leases and other arrangements. It provides percussion instruments and occasionally rents other instruments. It provides printed musical pieces. While there are arguments supporting both sides of this issue, the weight falls more heavily in favor of the musician status as employees considering all the tools and instrumentalities provided by the PSOA.

5. *The Musicians Are Highly Skilled Employees*

There is a high degree of skill required by all musicians and consequently this factor does fall on the side of the PSOA.

6. *The Parties Believe Differently Concerning Their Status as Employees Versus Independent Contractors*

There is a conflict in testimony on this issue. The PSOA considers the musicians as independent contractors, pointing to the independent contractor agreement that is provided to each musician. On the other hand, several of the musicians testified that they do consider themselves to be an employee of the Symphony irrespective of the execution of the agreement.⁵ While the

⁵The Board does not regard as determinative the fact that a written agreement defines the relationship as one of "independent contractor," *National Freight*, 153 NLRB 1536 (1965) or that employer does not make payroll

contractor agreement does provide payment without withholding of any appropriate city, state, or federal taxes, and nonpayment of any fringe benefits, that factor alone does not necessarily establish independent contractor status. As A.L.J. Green pointed out in *Igramo Enterprise, Inc.* and *Orces Fries* and *Gustavo Betancourt*, 2006 WL 2688796 (NLRB Division of Judges September 15, 2006 No. 20-CA-27247): “To the extent that the Respondent has failed to make deductions for taxes, Social Security, and has failed to make payments for Workers’ Compensation or for Unemployment insurance, this does not establish that these people are independent contractors. *Community Bus Lines*, 341 NLRB 61 (2004); *Houston Building Services, Inc.*, 296 NLRB 808 (1989). In my view, it merely demonstrates that the Respondent is probably violating a substantial number of other federal and state laws in the way it is treating persons who perform services exclusively for *Igramo* and who have no right of control over the ends or means of their work.” *Id.* Thus, the PSOA believes it is creating a contractor status, but the musicians believe to the contrary. Moreover, it is clear from the record that this is not a point upon which the musicians may challenge the Symphony, if they want the work. Therefore, neither side prevails on this factor.

7 *The Work, Playing Music, is Part of the PSOA’s Regular Business*

Undoubtedly the PSOA’s regular business is presentation of musical pieces in the Plano, Texas area. Consequently, the work by the musicians is part of the Employer’s regular business and this factor falls on the side of the Petitioner.

This is in strong contrast with the *Pennsylvania Academy of the Arts* decision cited above, wherein the Board determined models to be independent contractors since the employer’s business was the operation of a school and a museum offering degrees, continuing education programs, and deductions, *Miller Road Dairy*, 135 NLRB 217, 220 (1962).

children's programs. The Academy of Fine Arts was not in the business of modeling and the Board determined this to be a significant in favor of the independent contractor status, since the work provided, modeling, was not part of the Academy's regular business. The opposite is true in this case since the PSOA is in the business of music which is the work that the musicians perform. Therefore, Petitioner prevails on this factor.

8. *The Employer is "In the Business" of Music*

The PSOA is in the business of making music and no other business. While it provides some educational outreach activities, its business is playing music. There is no tangential relationship between the business of the PSOA and the services provided by the musicians. It is directly the playing of music for the public. This factor again falls on the side of the Petitioner.

9. *The Musicians Are Paid Both by the Job and by Time*

It is anticipated that the Employer will argue that their manner of paying the musicians supports a finding of independent contractor status. However, this ignores and de-emphasizes facts concerning the manner of payment, since musicians are paid both by the job and by time.

For most of the 2007-2008 season, musicians were paid a flat fee of \$122.00 per service for principal players and \$98.00 per service for section players. It appears that the PSOA subsequently increased those rates. Looking at these facts alone, this factor might weigh in favor of the PSOA. However, there are provisions for additional payment for extra work and there is also, with respect to certain musicians, payment of a cartage fee. Therefore, these musicians can be paid both by service and by time if the services run over the designated times.

10. *The Length of Time that Musicians Are Employed Varies Considerably*

The evidence is that some musicians have worked for the PSOA for a short period of time, but others, such as some of the witnesses have worked for an extended period of years. A

relationship that is so extended is more than an independent contractor arrangement but instead is indicative of an employment relationship.

In summary, the PSOA supposedly believes it is not creating an employment relationship by using the independent contractor agreement and by virtue of the fact that some of the payments are made on a per job basis. Contrast these factors with the PSOA's clear retention of control in both the manner and means in which the result is accomplished, the lack of any entrepreneurial risk of loss or other opportunity for gain, the supplying of some tools and a place of work by the PSOA, the belief by musicians that there is an employment relationship established, the fact that the work performed by the musicians is the PSOA's regular business, and that the PSOA is in the business of providing music to the public, the fact that musicians are also paid for certain expenses, and the long term relationship of many of the musicians with the PSOA, some lasting into multiple decades. Further, the PSOA's belief that it did not establish an employment relationship is belied by its imposition of discipline on employees, its implementation and enforcement of dress code and standards of conduct, its unilateral decision to determine how much the musicians earn, when they will work, what hours they will work, where they will work, and most importantly how they will work.

The facts in this case are very similar to those in the *Chamber Orchestra of Philadelphia*. The musicians at PSOA are completely unlike the models in the *Pennsylvania Academy of Fine Arts*. The models had complete control of their own schedules, could decide how many classes to accept, what hours to work, which classes to accept, and they could choose their schedule according to which type of professors and classes they preferred, when class times were convenient or any other basis they wish. There was no ongoing relationship between the models and the Art School. And most importantly, the models were in the business of modeling, while

the employer was in the business of running an art school. In this case, the musicians are in the occupation of playing music and the Employer is in the business of performing music and providing performances.

In the instant case, the only factor which clearly falls on the side of a finding of independent contractor status is the skill of the musicians. Factors which compel a finding for employee status are the following: (1) the lack of any entrepreneurial risk or loss or enjoyment of any entrepreneurial opportunity for gain by the musicians; (2) the control of the manner and means by which the result is accomplished; (3) whether the Employer is "in the business"; and (4) the work, playing music, is part of the Employer's regular business. There are other factors which arguably could be in support of both positions, those being that the musicians are engaged in a distinct occupation, that both parties provide the instrumentalities of work, that both parties believe differently concerning their status as employees versus independent contractors, that the musicians are paid both by job and by time, and that the length of time that the musicians are employed varies considerably.

Taking the entire record into account, and all the factors in the instant case, the PSOA simply has not carried its burden of showing that the musicians are independent contractors because on balance, they have not proven that the factors favoring independent contractor status outweigh the factors favoring employee status.

IV. **CONCLUSION**

For all the reasons asserted above, Petitioner would respectfully request that the Board direct an election with a finding that the musicians are employees and not independent contractors.

Respectfully submitted,

GILLESPIE, ROZEN, WATSKY & JONES, P.C.
3402 Oak Grove Ave., Suite 200
Dallas, Texas 75204
Telephone: (214) 720-2009
Facsimile: (214) 720-2291

By Yona Rozen
Yona Rozen
State Bar No. 17358500
yrozen@grwlawfirm.com

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was forwarded on this the 26th day of August, 2008, in the following manner to:

Adam J. Peters, Esq.
A.C. Counts, Esq.
Steven McCown, Esq.
LITTLER MENDELSON, P.C.
2001 Ross Avenue
Suite 1500, LB 116
Dallas, Texas 75201-2931

Martha Kinard, Regional Director
NATIONAL LABOR RELATIONS BOARD
REGION 16
819 Taylor Street
Fort Worth, Texas 76201

- ☐ Hand Delivery
- ☒ U.S. First Class Mail, postage pre-paid
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Express Mail
- ☐ Facsimile
- ☐ Electronic Mail (*e-mail*)

Yona Rozen
Yona Rozen